No. 374

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

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ANDREW J. MOLONEY, PETITIONER,

*vs.*

MARJORIE H. MOLONEY (Ailworth), RESPONDENT.

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## PETITION AND SUPPORTING BRIEF.

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## PETITION AND SUPPORTING BRIEF.

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### PETITION FOR WRIT OF CERTIORARI.

May it pleace the Court:

The Petition of Andrew J. Moloney respectfully shows to this Honorable Court:

The Supreme Court of the State of Kansas, pursuant to opinion filed June 11th, 1949, reported in 167 Kan. 444, after timely motion for rehearing, overruled July 8, 1949, affirmed a judgment of the District Court of Morris County, Kansas, in favor of respondent Marjorie H.

Moloney Ailworth and against petitioner Andrew J. Moloney, awarding the custody of the two children of the petitioner and respondent to the respondent under the circumstances hereinafter set out. Petitioner prays review of the final judgment of July 8, 1949, which denied the motion for rehearing.

## A.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner, Andrew J. Moloney, and the respondent, Marjorie H. Moloney were married in St. Louis, Missouri, in 1943.

Two children (both girls of tender years) whose custody is now in question, were born of the marriage.

The petitioner was born and reared in St. Louis, Missouri, and respondent after marriage lived with petitioner in Missouri, until May, 1946, as hereinafter stated.

### PROCEEDINGS IN MISSOURI COURT.

In 1946, the respondent brought an action for divorce against petitioner, Andrew J. Moloney, in the Circuit Court in St. Louis, Missouri.

On May 10, 1946, the court granted the divorce to the defendant in that action (petitioner here) on his cross-petition.

In the decree custody of the two children was given to each parent for a part of each year, and respondent was permitted to take the children to Kansas. Immediately after the decree of divorce on May 10, 1946, the

respondent Marjorie H. Moloney brought the two children to Kansas where they have since remained.

On May 19, 1946, the respondent Marjorie H. Moloney was married in Kansas, to James Ailworth. This marriage was *nine* days after the Missouri decree of May 10, 1946.

Later the Missouri decree of May 10, 1946, was set aside upon the court's own motion. Thereupon the petitioner Andrew J. Moloney filed an amended cross-petition, and on September 12, 1946, the petitioner Andrew J. Moloney was again awarded a decree of divorce and was given the custody of the two children.

## PROCEEDINGS IN KANSAS COURTS.

On October 16, 1946, the petitioner, Andrew J. Moloney, filed a petition for writ of habeas corpus and custody of the minor children in the District Court of Morris County, Kansas. The petition set forth the decree of the Circuit Court of St. Louis, Missouri, rendered on September 12, 1946, and set up therein "That said judgment is entitled to full faith and credit in the State of Kansas and in the courts thereof." (R. Case No. 36854, pg. 5)

The habeas corpus action was filed 34 days after the last Missouri decree of September 12, 1946. Upon hearing had upon the petition for the writ and return to writ and answer of respondent Marjorie H. Moloney Ailworth, the District Court of Morris County sustained a demurrer to the evidence of petitioner and entered its

judgment in which the writ was denied. (R. Case No. 36854, pg. 2)

**FIRST APPEAL.**

From this judgment petitioner appealed to the Supreme Court of Kansas, resulting in the judgment and opinion of the court filed October 4, 1947. (See Moloney v. Moloney, 163 Kan. 597, 185 P. 2d 167, R. Case No. 36,854, pg. 18)

By such judgment, the Supreme Court ruled that the decree of September 12, 1946, not only entitled to full faith and credit and it became res judicata concerning any matter properly determined at the time the decree was rendered. (R. Case No. 36,854, pg. 18) Thereupon the court remanded the case to the District Court with instructions to hear evidence as to conditions "which may have changed subsequent to September 12, 1946, and pertaining to the best interests of the children insofar as their present and future welfare is concerned."

Thereafter and pursuant to the mandate of the Supreme Court of Kansas, the District Court of Morris County, Kansas, on February 17th, 1948, heard evidence including a duly authenticated copy of the decree of divorce of the Missouri Court dated September 12, 1946, and the testimony of many witnesses. Thereafter the trial court made findings of fact and returned conclusions of law.

The conclusions of law entered March 12, 1948, were, in part, as follows:

"1. That the petition should be denied and the respondent discharged.

2. That the children in question should be committed to the care and custody of their mother, the respondent, Marjorie Ailworth, subject to the further orders of the court." (R. Case No. 37,527, pgs. 2 to 11)

**SECOND APPEAL.**

From the judgment and ruling so made by the District Court, the petitioner, Andrew J. Moloney, again appealed to the Supreme Court of Kansas.

The specifications of error were in part as follows:

"5. In entering judgment on March 12, 1948, denying plaintiff's petition for writ of habeas corpus and entering judgment giving custody of the children to respondent.

6. The judgment and decree denying the writ violates the full faith and credit clause of the Constitution of the United States." (R. Case No. 37,527, pg. 17)

On June 11, 1949, the Supreme Court affirmed the judgment of the District Court. (See Moloney v. Moloney, 167 Kan. 444.) (R. Case No. 37,527, pg. 18)

In due time, the appellant (petitioner, Andrew J. Moloney) filed his motion for a rehearing which motion was, on July 8, 1949, denied by the Supreme Court. (Copy of Motion in record.) (R. Case No. 37,527, pg. 32) The final judgment of July 8, 1949, is here in question.

## NO PROOF AS TO MISSOURI LAW.

No evidence was introduced as to the force and effect the final Missouri judgment of September 12, 1946, would be entitled to receive by the Courts of Missouri.

In such case the Courts of Kansas will assume that the laws of Missouri are the same as the Kansas law. (See supporting Brief.)

## B.

## JURISDICTION.

### I.

The jurisdiction of this court is believed to be sustained under Section 237 of the Judicial Code, as amended, 28 U. S. C. A., Section 344 (b), and in conformity with rule 38 of this court.

### II.

The date of the final judgment of the Supreme Court of Kansas for which a review is asked in this proceedings is July 8, 1949.

This final judgment was a judgment of the Supreme Court of Kansas overruling petitioner's motion for rehearing upon judgment of that court on June 11, 1949.

The judgment of June 11, 1949, affirmed the judgment of the trial court denying petitioner's application for writ of habeas corpus.

For judgment of June 11, 1949, see (R. Case No. 37,529, pg. 29).

For motion for rehearing, see (R. Case No. 37,527, pg. 32).

For judgment overruling motion for rehearing, see (R. Case No. 37,529, pg. 38).

## JUDGMENT OVERRULING MOTION FOR REHEARING IS FINAL JUDGMENT.

The motion for rehearing was filed pursuant to the Rules of Supreme Court of Kansas, which provide:

### POST DECISION MOTIONS.

> "No. 16. Motions for Rehearing, etc. Motion for rehearing or for a modification of the judgment, as for the reinstatement of a case that has been dismissed, may be filed within twenty days after the decision, a copy being furnished to opposing counsel." See Rules of the Kansas Supreme Court, 153 Kan. pg. 14.

A motion for rehearing was timely filed, was entertained by the court and on July 8, 1949, was overruled. (R. Case No. 37,527, Motion at page 32, Judgment affirmed at page 39.)

## OVERRULING MOTION FOR REHEARING IS FINAL JUDGMENT.

We believe the judgment of the Supreme Court of Kansas, overruling petitioner's motion for a rehearing is a final judgment under Section 237 of the Judicial Code as amended, 28 U. S. C., Section 344, 28 U. S. C. A. 344b. Nothing remained to be done but the ministerial act of issuing the mandate to the trial court and entering the judgment by the trial court as directed by the mandate. The mandate is shown in the record. (R. Case No. 37,529, pg. 39)

By such judgment the rights of the parties were fully adjudicated and such adjudication was not subject to further review by the Kansas Courts.

We believe the following authorities sustain our contention:

Gospel Army v. City of Los Angeles, 331 U. S. 543; 67 S. Ct. 1428.
Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 67 S. Ct. 156.
Puget Sound Power & Light Company v. King Company, 264 U. S. 22, 44 S. Ct. 615, 78 L. Ed. 1160, 98 A. L. R. 347.
Radio Station WOW v. Johnson, 326 U. S. 120, 65 S. Ct. 1475.

**CONSTITUTIONAL QUESTION PROPERLY RAISED.**

As will be shown in the Supporting Brief below, the full faith and credit clause of the Constitution of the United States was, we believe, timely presented at every stage of this litigation.

**C.**

**THE QUESTIONS PRESENTED.**

Under the facts set forth in the summary statement of facts above, we believe the following questions are presented:

Under the full faith and credit clause of the Constitution of the United States, (Art. IV, Section 1), what is the effect of the Missouri decree of September 28, 1946, awarding the custody of the children to petitioner?

I.

When on that date the children were in Kansas, having been taken to Kansas by authority of the court after the decree of May 10, 1946, by respondent, under circumstances which caused the Missouri court to set aside the decree of its own motion. (R. Case No. 36,854, pgs. 15, 16, 17)

II.

Does the power of Kansas to modify the Missouri decree of September 26, 1946, accrue as soon as the children enter Kansas or only after such time as a change of circumstances affecting the welfare of the children is shown?

III.

There being no evidence that Missouri made any change in custody decree of September 12, 1946, does Kansas have the power to enter a decree changing the custody of the children prior to a reasonable time under all the circumstances, when a change of circumstances affecting the welfare of the children could be shown?

IV.

Under Art. IV, Section 1, of the Constitution and the Act of Congress of May 26, 1790, as amended, R. S. Sec. 905, 28 U. S. C., Sec. 687, 28 U. S. C. A., Sec. 687, is the Missouri custody decree binding on Kansas before such reasonable time (to be determined by this court) when a change of circumstances affecting the welfare of the children could be shown?

What is a reasonable time in which such change of circumstances affecting the welfare of the children may be shown?

When does the power of Missouri cease and when does the power of Kansas come into being?

This court alone can enter this "penumbral area" and formulate rules to guide the courts.

A solution of these questions will relieve the throes and agonies of the courts, both trial and appellate, throughout the land.

## D.

## REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

### I.

The Supreme Court of Kansas has in this case decided a federal question of substance not heretofore determined by this court.

### II.

The final decree of the Missouri Court granting divorce to the petitioner and awarding him custody of the two minor children was on September 12, 1946.

Petitioner filed habeas corpus in Kansas, asking custody of the minor children, on October 16, 1946. This was 34 days after the final decree in Missouri, and would seem to be as soon as petitioner, with due diligence, could act. On that date the domicile of the parents and of their two children was in Missouri.

## III.

The domicile of the parents and of the children being in Missouri and the court in that state having jurisdiction to award custody, then we submit that under the full faith and credit clause of the Federal Constitution such judgment was entitled to recognition by the Kansas Courts, until such time as change of circumstances affecting the welfare of the children are shown.

## IV.

## QUESTIONS RESERVED IN THE HALVEY CASE.

We believe this case presents certain questions reserved by this court in People of the State of New York v. Halvey, 330 U. S. 610, 67 S. Ct. 903.

The questions are:

(a) Whether Missouri at the time of the decree of September 12, 1946, had jurisdiction over the children the mother having removed them to Kansas after the proceedings started, but before the final decree was entered?

As a reason for allowance of the writ, we contend the answer must be yes. Kansas did not acquire jurisdiction over the children. (See supporting brief.)

(b) Whether the power of Kansas to modify the custody decree was greater than Missouri's power?

We contend the power of Kansas does not attach until the welfare of the children is in jeopardy; that there must be a change of circumstances; that there must be a reasonable time before there could be a change of circumstances affecting their welfare; that the failure and

refusal of the Kansas court to allow the petitioner a reasonable time under all the circumstances to bring habeas corpus deprived petitioner of his rights under the full faith and credit clause of the Federal Constitution and assign such ruling as a valid ground for issuance of the writ.

(c) Whether the state which has jurisdiction over the child may, regardless of a custody decree rendered by another state, make such orders concerning custody as the welfare of the children from time to time requires?

We contend that in this case as respondent was allowed to take the children from Missouri to Kansas by reason of "fraud, deceit and perjury" on the Missouri Court (R. Case No. 36,854, pgs. 15, 16, 17) that Kansas did not acquire jurisdiction over the children. The Missouri court had determined the question of the welfare of the children 34 days before petitioner filed habeas corpus, and such ruling is binding on Kansas until a change in circumstances could be shown.

We also urge that as respondent invoked the jurisdiction of the Missouri court by filing the divorce action she is now estopped from denying the binding effect of the Missouri decree. (R. Case No. 36,854, pg. 18)

Under the circumstances, Kansas had no power to modify the Missouri decree, and we assign the ruling of the Kansas Supreme Court of July 8, 1949, that Kansas could modify the Missouri decree as a ground for issuing the writ prayed for herein.

V.

We believe and earnestly contend that the Supreme Court of Kansas by denying petitioner's motion for a rehearing (R. Case No. 37,527, pg. 38) denied petitioner the right guaranteed to him under Art. IV, Section 1 of the Constitution of the United States, and believe such ruling and judgment as ground for allowance of the writ prayed for herein.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Kansas, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete record and all proceedings in the cases numbered and entitled on its docket "No. 36,854 and No. 37,527, Andrew J. Moloney, appellant v. Marjorie H. Moloney (Ailworth), appellee", and that said judgment of the Supreme Court of Kansas may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ANDREW J. MOLONEY,
HARRY K. ALLEN,
L. M. ASCOUGH,
Counsel for Petitioner.

ROBERT STONE,
Of Counsel and member of the Bar of
The Supreme Court of the United States.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### JUDGMENT OF THE COURT BELOW.

There were two appeals to the Supreme Court of Kansas in this case:

1. The decision in the first appeal on October 1, 1947, is reported in Moloney v. Moloney, 163 Kan. 597, 185 P. 2d 167, and is in the record. (R. Case No. 36,854, pg. 18)

2. The decision in the second appeal on June 11, 1949, affirmed the judgment of the trial court denying the writ of habeas corpus, Moloney v. Moloney, 167 Kan. 444. (Advance Sheets of the Kansas reports.) The opinion is in the record. (R. Case No. 37,527, pg. 18)

3. In due time petitioner filed motion for rehearing. (R. Case No. 37,527, pg. 32)

4. On July 8, 1949, the Supreme Court of Kansas entered judgment denying the motion.

5. In the present proceedings petitioner prays this Honorable Court to review the judgment of July 8, 1949, denying the motion for rehearing. We believe this is a final judgment under the decisions of this court. (See authorities hereinafter cited.)

## POINT A.

## CONSTITUTIONAL RIGHTS OF PETITIONER UNDER ART. IV SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES INVOKED THROUGHOUT PROCEEDINGS.

### Petition for Habeas Corpus.

In the petition for habeas corpus it was alleged that the Missouri judgment of September 12, 1946, "is entitled to full faith and credit in the state of Kansas, and in the courts thereof." (R. Case No. 36,854, pg. 5)

### First Appeal.

In the specifications of error on the first appeal (R. Case No. 36,854, pg. 17½) failure to observe the full faith and credit clause was not specified as error.

However, under the decisions of this court we believe this omission is not fatal for the following reasons:

First: The full faith and credit clause of the Federal Constitution was argued at length by counsel for appellant in that appeal under the head note in their brief: "Was the Missouri decree, September 12, 1946, enforceable in Kansas, especially in reference to the Moloney children." See appellant's brief in Case No. 36,854, page 9. We attach a copy of that brief to this petition.

Second: The full faith and credit clause of the Constitution of the United States was fully and carefully considered by the Supreme Court of Kansas, in such first appeal. We quote the full syllabus of the court. (Moloney v. Moloney, 163 Kan. 597, 185 P. 2d 167.)

> "*Conflict of Laws—Conclusiveness of Foreign Decree—Custody—Jurisdiction.* A wife and mother liv-

ing in a foreign jurisdiction brought an action there for a divorce and custody of her children. Her husband was granted a divorce on a cross petition and she was granted custody of the children and permitted to bring them to Kansas. A new trial was granted by the court of foreign jurisdiction and custody of the children was given therein to the husband, who thereafter brought a habeas corpus proceeding in Kansas to recover possession of them from their mother.

HELD, the final decree of the foreign court was entitled to full faith and credit and the mother, having invoked its jurisdiction for the purpose of having the custody of the children determined by such court, cannot assert that such foreign court lost jurisdiction of the children by reason of their having been brought to Kansas prior to the issuance of the final custody decree by the foreign court. (Following Kirby v. Kirby, 143 Kan. 430, 55 P. 2d 356.)"

Third: As the Federal question was considered and decided by the Supreme Court of Kansas, we believe, under the decisions of this court, it is immaterial to inquire how and when the question was raised.

Home Ins. Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A. L. R. 701.

"Jurisdiction of the Supreme Court of the United States" by Robertson v. Kirkham, Section 77, and authorities there cited.

**Second Appeal.**

**I.**

On the Second Appeal the specifications of errors contained the following:

> "6. The judgment and decree denying the writ violates the full faith and credit clause of the Constitution of the United States." (R. Case No. 37,527, pg. 17)

**II.**

The decision of the Supreme Court of Kansas on the second appeal on June 11, 1949, shows that the constitutional question under Art. IV, Sec. 1, was thoroughly considered by the court. The opinion of the Court is in the record. (R. Case No. 37,527, pg. 18)

**III.**

After the decision of the Supreme Court of Kansas on June 11, 1946, petitioner, in due time under the rules and practice of that court, filed his motion for a rehearing in which the Federal question was again raised. The motion for rehearing is in the record. (R. Case No. 37,527, pg. 32) On July 8, 1949, the motion was by the court denied.

## POINT B.

## JURISDICTION.

### I.

The jurisdiction of this court is believed to be sustained under Section 237 of the Judicial Code, as amended, 28 U. S. C. A. Section 344 (b), and in conformity with rule 38 of this court.

### II.

The date of the final judgment of the Supreme Court of Kansas for which a review is asked in this proceedings is July 8, 1949.

This final judgment was a judgment of the Supreme Court of Kansas overruling petitioner's motion for rehearing upon judgment of that court on June 11, 1949.

The judgment of June 11, 1949, affirmed the judgment of the trial court denying petitioners application for writ of habeas corpus.

For judgment of June 11, 1949, see (R. Case No. 37,529, pg. 29).

For motion for rehearing, see (R. Case No. 37,527, pg. 32).

For judgment overruling motion for rehearing see (R. Case No. 37,529, pg. 38).

**Judgment Overruling Motion for Rehearing is Final Judgment.**

The motion for rehearing was filed pursuant to the Rules of Supreme Court of Kansas, which provide:

**Post Decision Motions.**

"No. 16. Motions for Rehearing, etc. Motion for a rehearing or for a modification of the judgment, as for the reinstatement of a case that has been dismissed, may be filed within twenty days after the decision, a copy being furnished to opposing counsel." See Rules of the Supreme Court, 153 Kan. pg. 14.

A motion for rehearing was timely filed, was entertained by the court and on July 8, 1949, was overruled. (R. Case No. 37,527, Motion at page 32, Judgment affirmed at page 39.)

**Overruling Motion for Rehearing is Final Judgment.**

We believe the judgment of the Supreme Court of Kansas, overruling petitioner's motion for a rehearing is a final judgment under Section 237 of the Judicial Code, 28 U. S. C. Section 344, 28 U. S. C. A. 344. Nothing remained to be done but the ministerial act of issuing the mandate to the trial court and entering the judgment by the trial court as directed by the mandate. The mandate is shown in the record. (R. Case No. 37,529, pg. 39)

By such judgment the rights of the parties were fully adjudicated and such adjudication was not subject to further review by the Kansas Courts.

We believe the following authorities sustain our contention:

Gospel Army v. City of Los Angeles, 331 U. S. 543; 67 S. Ct. 1428.

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 67 S. Ct. 156.

Puget Sound Power & Light Company v. King Company, 264 U. S. 22, 44 S. Ct. 615, 78 L. Ed. 1160, 98 A. L. R. 347.

Radio Station WOW v. Johnson, 326 U. S. 120, 65 S. C. 1475.

## POINT C.

## NO EVIDENCE OF THE LAW OF MISSOURI INTRODUCED.

### I.

In this case no evidence was introduced as to the power of Missouri to modify their decision of September 12, 1946.

Kansas must give such faith and credit to the Missouri judgment of September 12, 1946, as will be given to such judgment by law or usage in the courts of Missouri.

In the absence of a showing to the contrary, Kansas will presume that the law of Missouri on this question is the same as the Kansas law.

The case of Bleakley v. Barkley, 75 Kan. 462, 89 Pac. 906, was a child custody case. In the opinion, page 477, the court stated:

> "A judgment of a sister state rendered by a court of competent jurisdiction having jurisdiction of the parties and the subject matter will be given in this state the same force and effect to which it is entitled in the state where it was rendered. In the absence of proof as to the force and effect which the former judgment would be entitled to receive in

the courts of Illinois, we assume that the law there is as here. Here the judgment would be res judicata."

To the same effect see:

Nichols v. Bryden, 86 Kan. 941, 122 P. 1119.
Newton v. New York Life Ins. Co., 95 Kan. 427, 114 P. 619.
Mercado v. Nelson, 118 Kan. 302, 235 P. 123.

We believe the Federal rule is the same. Treinies v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85.

## II.

### The Law in Missouri Same as Kansas.

Under the foregoing rule that the Missouri law, in the absence of proof, is the same as the Kansas law, we cite some of the recent Kansas Cases.

In White v. White, 160 Kan. 32, 159 P. 2d 461, the California court by its decree in September, 1941, gave the custody of the children to the mother. In violation of the order of the California court the father had brought the children to Kansas, and after about four years, the mother brought habeas corpus in Kansas. In giving effect to the California judgment awarding custody to the mother the Kansas Supreme Court ruled as stated in the syllabus:

"1. PARENT AND CHILD.—*Custody of Child—Prior decree.* A decree awarding custody of a minor is not *res judicata* in the sense generally applicable to judgments. In a proper proceeding the issue of custody may be subsequently inquired into upon the facts and circumstances then existing.

2. SAME — *Conclusiveness of Custody Decree.* Such a decree becomes *res judicata* concerning matters then determined as of the time the decree was rendered.

3. SAME—*Action for Custody—Burden of Proof.* Where the fitness of one parent to have custody of a minor child has been determined and by valid decree custody has been awarded to such parent, and in a subsequent action the other parent seeks to obtain custody, the burden is upon such other parent to show that custody should be changed.

4. HABEAS CORPUS—*Application to Obtain Custody of Child—Right to Custody under Prior Decree.* A mother to whom custody of minor children had been lawfully awarded by a California court brought a proceeding in habeas corpus in this state to recover actual custody of the children from a father who had brought them here in violation of the order of the California court. Record examined, and held that under the facts and circumstances disclosed and set out in the opinion, the trial court was not justified in taking legal custody from the mother and giving it to the father."

In Kruse v. Kruse, 150 Kan. 947, 96 P. 2d 849, the husband in 1928, secured a decree of divorce against his wife in Missouri. The custody of the child was awarded alternately to each parent for six months. Later in 1923, the court modified the original order and gave the custody of the child to the mother. Shortly thereafter the mother took the child to Kansas.

In 1939, the Missouri Court entered a decree awarding the custody of the child to the father, who thereupon brought habeas corpus for the child.

The Supreme Court of Kansas held that under the circumstances the domicile of the child was in Kansas, and Kansas was not bound by the full faith and credit clause of the Federal Constitution.

The Court stated:

> "The parent to whom the custody of a child has been awarded often takes a child into another state and there establishes a new domicile. Where such migration occurs and the child has acquired a new domicile, a decree for the custody of the child in a state where the child is neither resident nor domiciled, is void for lack of jurisdiction."

In the Kruse case the mother was given the custody of the child and took the child to Kansas. The mother and the child had lived in Kansas eleven years when the Missouri court entered another decree, awarding the custody to the father.

Under the change of circumstances and the new domicile acquired by the child, the Kansas court held it was not bound by the full faith and credit clause of the Federal Constitution.

We call the Court's attention to the following Kansas cases:

Janney v. Janney, 159 Kan. 230, 154 P. 2d 131. Here husband and wife were divorced in 1939 and custody of the child was awarded the mother. In 1943, the trial court, by reason of change of circumstances, awarded the custody to the father. This decree was affirmed.

Coats v. Coats, 161 Kan. 307, 167 P. 2d 290. In this case the wife, who was granted a divorce and custody

of two minor children, later moved the court for permission to take the children to California, where she planned to live. The husband asked for an order restraining her from taking the children out of the jurisdiction of the Court.

The Court stated:

> "Clearly the court would have the authority, if the facts should justify it, to make an order changing the custody of the children, or to authorize defendant to stop monthly payments for their support, or to do both. If that were done there is no reason to think the California Court would not give such orders proper recognition, just as we gave similar orders of a California Court proper recognition here in the recent case of White v. White, 160 Kan. 32, 159 P. 2d 461, where many authorities on the matter are set out or cited."

Wear v. Wear, 130 Kan. 205, 285 Pac. 606, is an important Kansas case. As stated in the syllabus the court held:

> "1. DIVORCE — *Jurisdiction as to Custody of Minor Children—Foreign Domicile.* It is the general rule that in an action for divorce a court does not have jurisdiction to adjudicate the custody of a minor child domiciled in another state.
>
> 2. SAME—*Effect of Foreign Decree.* It is the policy of the law of this state to give to a decree of divorce rendered in another state the same force and effect, in so far as that can be done, as though the decree had been rendered by a court of this state.
>
> 3. PARENT AND CHILD — *Habeas Corpus for Custody — Jurisdiction of Court.* In a habeas corpus proceeding brought by one of the parents against the other for the custody of their child, the Court

has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the state as *parens patriae* has to promote the best interests of the child.

4. SAME—*Right to Custody of Child—Effect of Foreign Decree—Test of Child's Domicile.* A husband and wife, with their child, resided in Oklahoma City, which place was their domicile. The husband took his personal belongings and came to Kansas with the purpose of establishing a residence and domicile for himself in this state, but leaving his household goods, his wife and child and their personal effects in Oklahoma City. Shortly thereafter the wife sent the child to Kansas to visit relatives with whom the husband was staying. Soon thereafter the wife brought, at Oklahoma City, an action for divorce against her husband. The husband appeared in that case and set up, among other things, that the child was visiting in Kansas. He contested the ground for divorce alleged against him by his wife. The court held the husband to be at fault, that the wife was a proper person to have the custody of the child, that the child was domiciled in Oklahoma, and was visiting in Kansas, and entered a decree of divorce in favor of the wife and gave her the custody of the child. The child was not present in Oklahoma at the time the action for divorce was brought, or at the time it was tried. Soon thereafter the wife came to Kansas and brought a habeas corpus proceeding against her husband for the custody of the child, relying upon the decree in the Oklahoma case. Respondent offered no evidence that the mother was not a proper person to have the custody of the child, or that it was for the best interests of the child that it remain with the respondent, or others, or that there was any changed condition since the time of the decree in Oklahoma.

It is *held*: First, that the question before the court was the right to the custody of the child as between the father and mother. Second, that the decree of the Oklahoma court was binding as between those parties as to all matters placed in issue and determined by that court. *Further held,* that the husband, by coming to Kansas under the circumstances stated, did not change the domicile of his wife or his child from Oklahoma City, and the fact that the child was sent by the mother to visit relatives in Kansas, at a place where the father was staying, did not change the domicile of the child from Oklahoma City to Kansas."

We have cited the most recent decisions of the Kansas Supreme Court.

In addition, Kansas has a statute which reads:

G. S. 1935, Section 60-1518:

"*Divorce Rendered In Another State Recognized; Proceedings as to Alimony and Property Rights of Residents of Kansas, Limitation.* A judgment or decree of divorce rendered in any other state or territory of the United States, in conformity with the laws thereof, shall be given full faith and credit in this state; except, that in the event the defendant in such action, at the time of such judgment or decree, was a resident of this state and had not been served personally with process, or did not personally appear or defend the action in the court of such state or territory, all matters relating to alimony, and to the property rights of the parties and to the custody and maintenance of the minor children of the parties, shall be subject to inquiry and determination in any proper action or proceeding brought in the courts of this state within two years after the date of the foreign judgment or decree, to the

same extent as though the foreign judgment or decree had not been rendered."

Also the Kansas statute G. S. 1935, Section 60-1510, provides:

"When a divorce is granted the court shall make provision for the guardianship, custody, support and education of the minor children of the marriage, and may modify or change any order in this respect whenever circumstances render such change necessary."

Under the presumption above referred to the Missouri law (no proof having been made thereof) is the same as the Kansas law. As Kansas gives effect to a custody decree of a sister state, so does Missouri.

## POINT D.

## RESERVATIONS IN THE HALVEY CASE.

Therefore in the terms of the reservations in People of State of New York v. Halvey, 330 U. S. 610, 67 S. Ct. 903, we respectfully submit:

### I.

Whether Missouri at the time of the decree of September 12, 1946, had jurisdiction over the minor children, the mother having removed them from Missouri after the proceedings started and before the decree was entered?

Under Moloney v. Moloney, 163 Kan. 597, 185 P. 2d 167, above cited, we believe the answer must be yes.

II.

Is the power of Kansas to modify the custody decree greater than Missouri's power?

The Kansas statute (G. S. 1935, Sec. 60-1510) above quoted states that upon divorce the court shall provide for the custody of the minor children and may modify the order "whenever circumstances render such change necessary". Kansas decisions are to the same effect.

Assuming the Missouri rule is the same the important question is within what period of time the petitioner was called upon to assert his rights under the Missouri decree to bring habeas corpus?

**Real Question in the Case.**

We believe there are two ultimate questions before the court.

I.

Does Kansas have jurisdiction to award custody of children having legal domicile in Missouri?

As Missouri may modify a custody decree entered in Missouri then under the Act of Congress of May 26, 1790, as amended, Kansas has the same power.

II.

Under the Kansas decisions and the Kansas statute above cited (G. S. 1935, Sec. 60-1510) the Kansas courts may modify or change a custody decree "whenever circumstances render such change necessary."

Is this power an arbitrary and unlimited power?

In the case of deserted children, Kansas has the power to act as soon as such dependent children come within her borders. In such case the police power of the state is invoked.

But we are confronted with a case where the Missouri court on September 12, 1946, had before it the custody of the children; that question was at issue; evidence was heard and the question was adjudicated.

To hold that Kansas could immediately change the custody of the children is to hold that the full faith and credit clause has no extraterritorial effect whatever, as to custody decrees.

To so hold is the same as ruling that the full faith and credit clause of the Federal Constitution does not apply to child custody decrees or judgments.

In the case at bar on October 16, 1946, when petitioner filed his petition for habeas corpus, the children were domiciled in Missouri but were physically present in Kansas.

In Re Bort, 25 Kan. 38, 37 Am. Rep. 255, the court seemed to deny that the full faith and credit clause was involved where the children were physically present in Kansas. We believe that case was overruled in the cases of Wear v. Wear, 130 Kan. 205, 285 Pac. 606, 72 A. L. R. 425, and later decisions.

It would seem that the case of Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624, 40 A. L. R. 937, declares the same view as the Bort case.

But we believe the great weight of authority is against Finlay v. Finlay and the Bort case. See Annotation, 4 A. L. R. 2d 7.

**When Does Power of Kansas Attach?**

We contend the power of Kansas does not attach until the welfare of the children is in jeopardy; that there must be a change of circumstances; that there must be a reasonable time before there could be a change of circumstances affecting their welfare; that such power cannot be exercised in an arbitrary and capricious manner; that the failure and refusal of the Kansas court to allow the petitioner a reasonable time under all the circumstances to bring habeas corpus deprived petitioner of his rights under the full faith and credit clause and assign such ruling as a valid ground for issuance of the writ.

## CONCLUSION.

We believe that while Kansas has power to change the custody of the children, but that such power is not an arbitrary and unlimited power; that it must be exercised in view of all the facts in the case; that the petitioner in the present case having used due diligence under all the circumstances that his petition for a writ of habeas corpus should have been allowed; that the Kansas court in denying the writ deprived petitioner of his rights under

the full faith and credit clause of the Constitution of the United States.

Respectfully submitted,

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